

The Influence of the Sexual Contract on the Law's Distribution of Property in Intimate Relationships

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Influence of the Sexual Contract on the Law's Distribution of Property in Intimate Relationships



Married ♀ property

- *Married Women's Property Acts*—equality (of opportunity)
- Yet ♀ (substantive) economic inequality remains
- **Distribution of property in the family home**

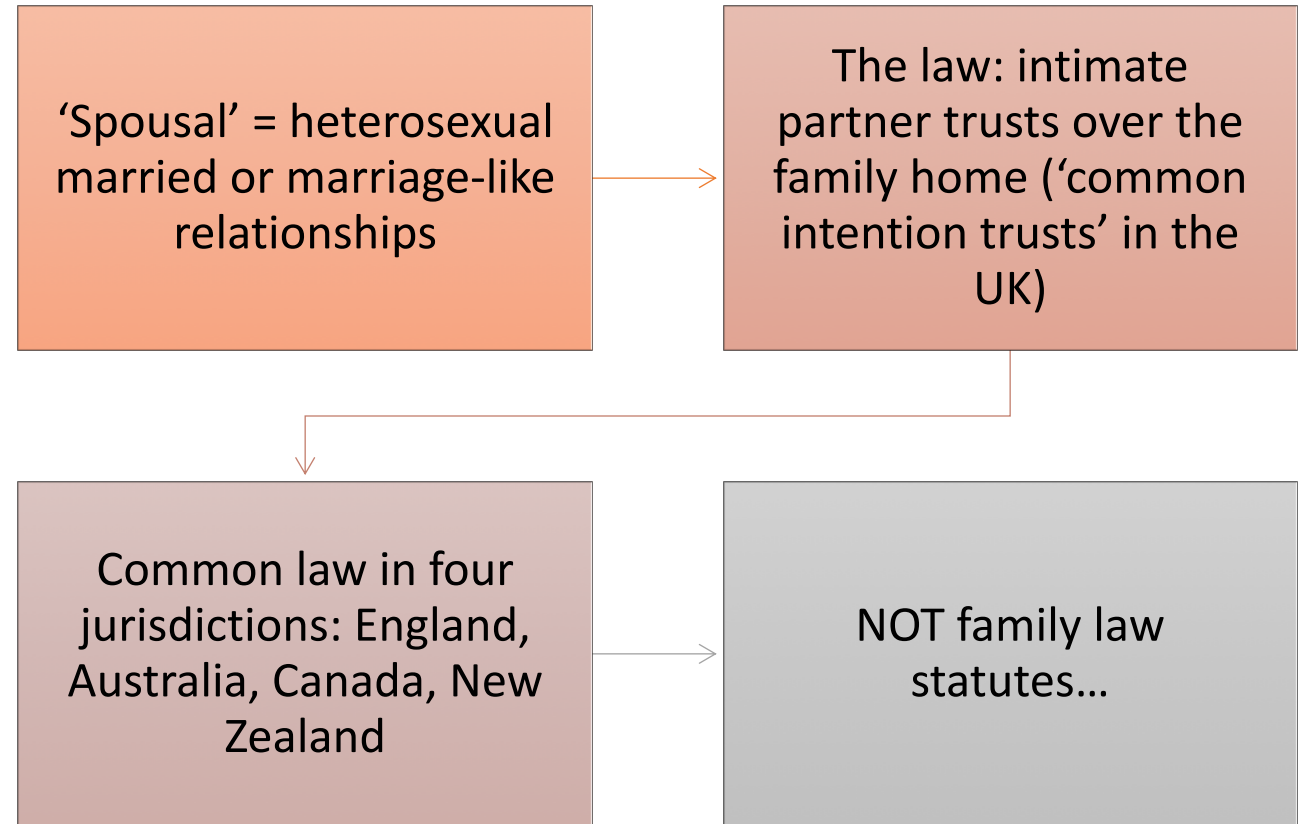




The thesis

The common law (judge-made law) distribution of spousal property is emblematic of the law's ongoing adherence to the sexual contract, upholding male sex-right at the expense of ♀ property

Scope





The argument

Property is emblematic of individualism



Duality of spousal property: individualism // union

On the one hand...

the parties come before the court as
individuals establishing independent
interests

On the other hand...

the ♀ interest derives from her
marriage which is governed by the sexual
contract



Intimate partner trust cases

- *Pettitt v Pettitt* (UK)
- *Gissing v Gissing* (UK)
- *Stack v Dowden* (UK)
- *Muschinski v Dodds* (Aus)
- *Baumgartner v Baumgartner* (Aus)
- *Pettkus v Becker* (Canada)
- *Kerr v Baranow* (Canada)
- *Lankow v Rose* (NZ)



The elements to
establish a
beneficial interest

Intention +
Contribution

*The indicia of property
as an expression of the
individual*



Courts locate intention and contribution within a (transactional) exchange

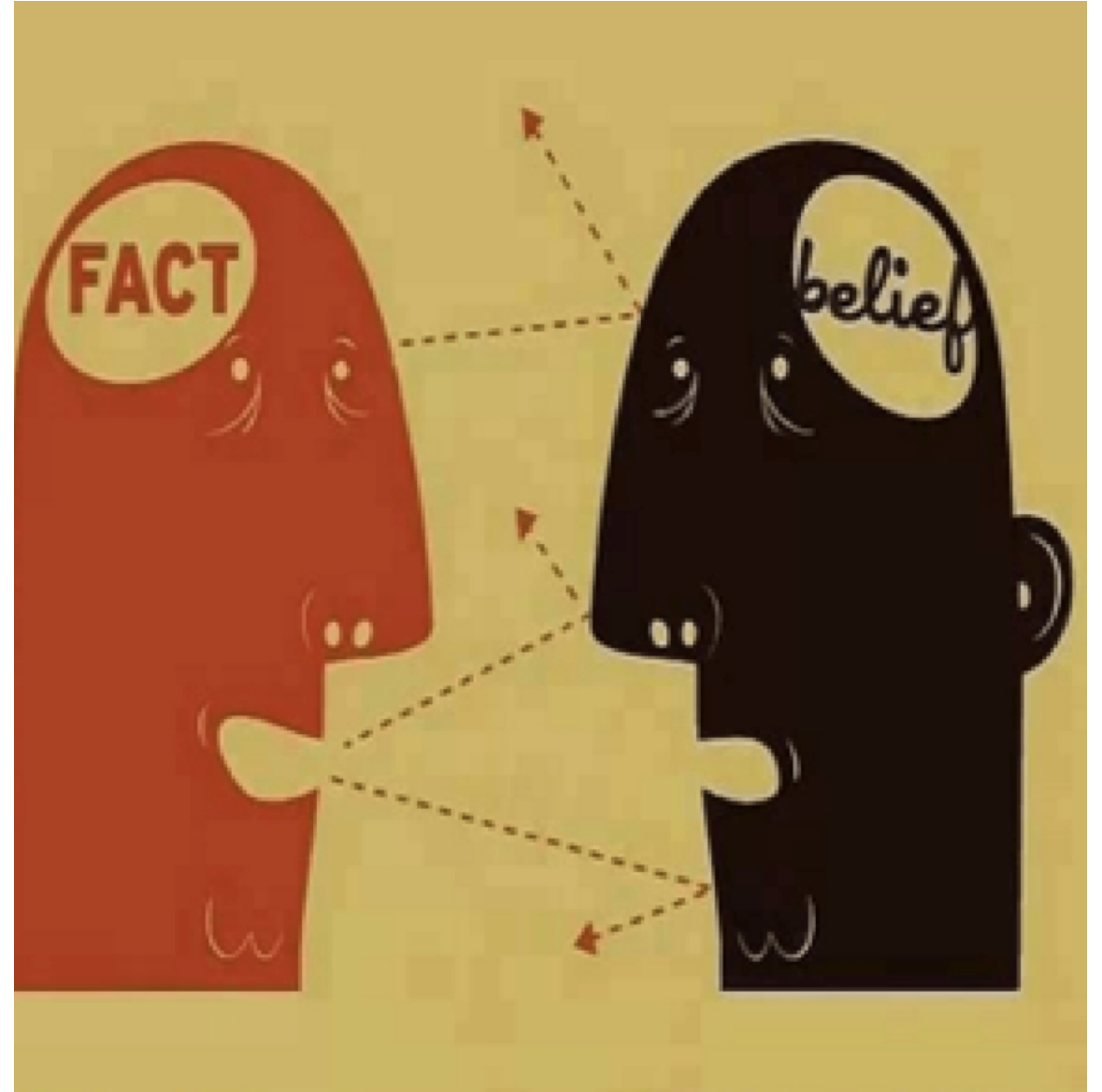
Contrast the marriage 'exchange'

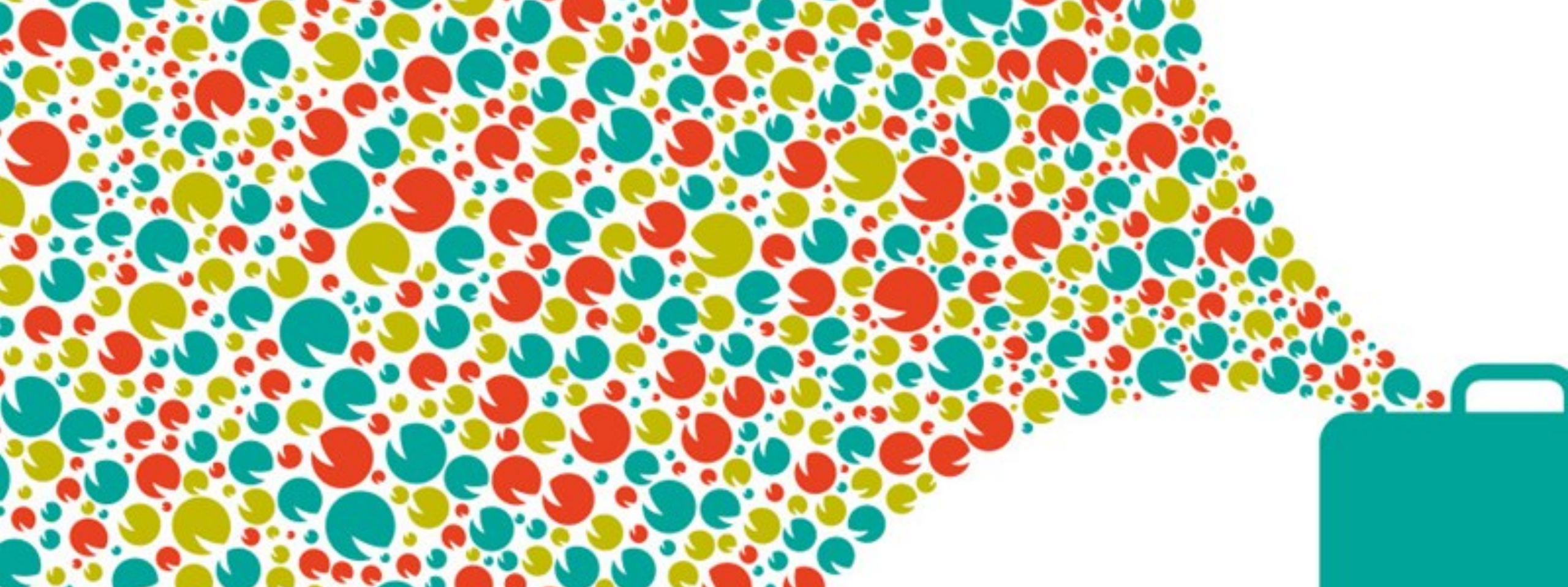
- *Obedience for protection (Pateman)*
- *Absence of intention/contribution for property*



The proposition

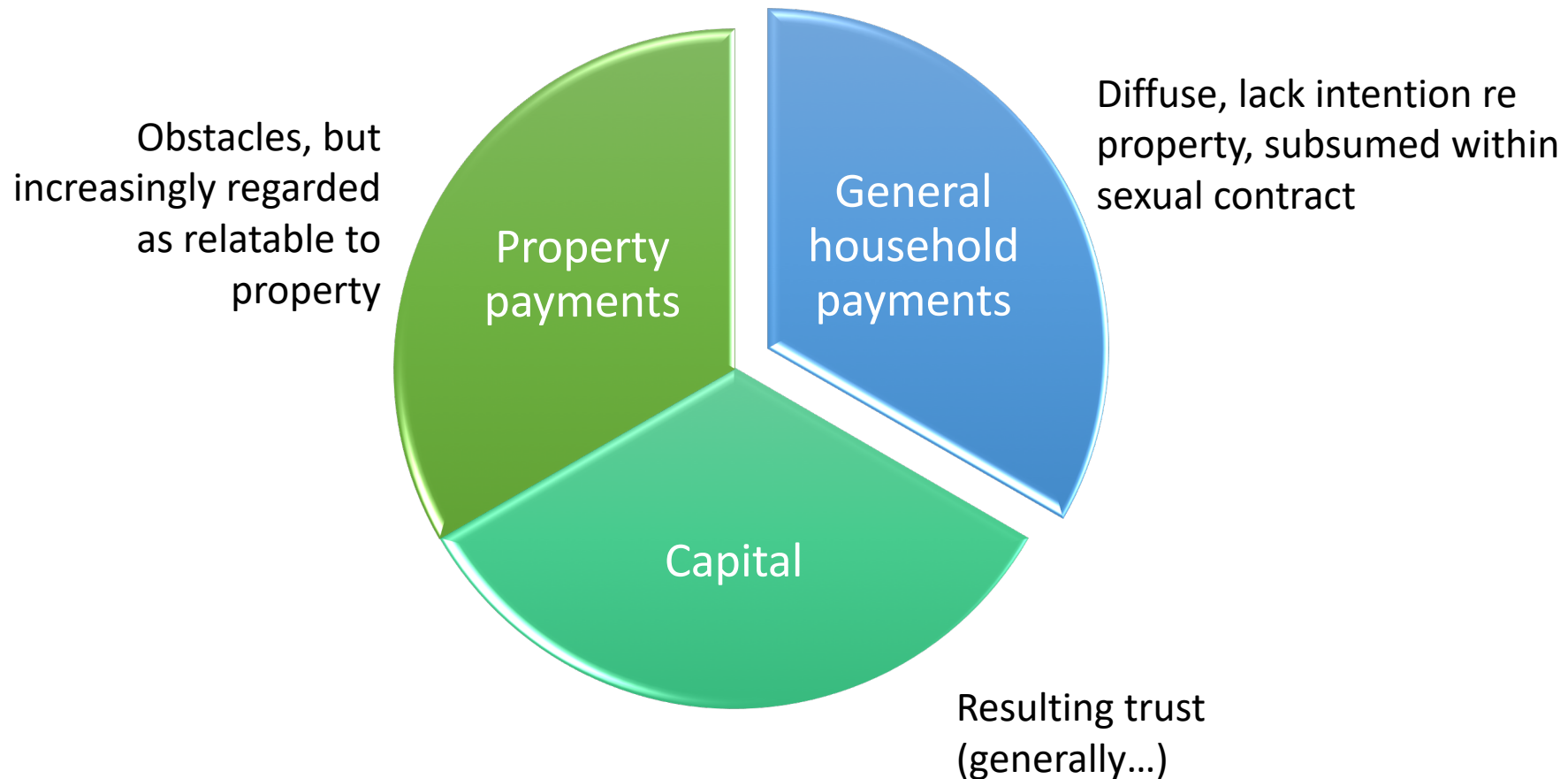
- Individual is the basis of establishing beneficial interest in the family home
- Sexual contract obviates free will, labour as indicia of women's individualism
- Property law upholds men's property





Case studies |

#1 Financial contribution: degrees of difficulty



Baumgartner (Aus)

- He was sole owner
- He stood over her to pay her wages to pooled account
- He used pooled account to pay off mortgage
- 'I did what I did because he promised to marry me' → Her expressed intention irrelevant
- Court believed his evidence, not hers, but still...
- *Intention that pooled funds be used to purchase property → sufficiently transactional to support beneficial interest*



Fowler v Barron (UK)

- Joint legal title
- He paid for mortgage
- Her money 'was for herself & her (sic) children'
- He claimed entire title
- *Successful at first instance*
- *Overtaken on appeal: intention derived from fact of joint legal title & he could not displace → contribution left unexplored; no need to locate transaction, simply rely on legal title*



#2 Household contribution

Labour must be beyond the 'sort of things which a wife does for the benefit of the family' such as 'clean[ing] the walls or work[ing] in the garden or help[ing] her husband with the painting and decorating'

Pettitt v Pettitt [1970] AC 777, 796



(Exchange) Value of domestic labour

[W]hat being a woman (wife) means is to provide certain services for and at the command of a man (husband).

Pateman, 128



Labour outside the sexual contract

Haying, raking, swathing, moving [sic], driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding...

‘Ordinary ranch wife’

Murdoch v Murdoch [1975] 1 SCR 423, 443

Court may recognise contribution ‘continuously, unremittingly and sedulously in the joint effort’

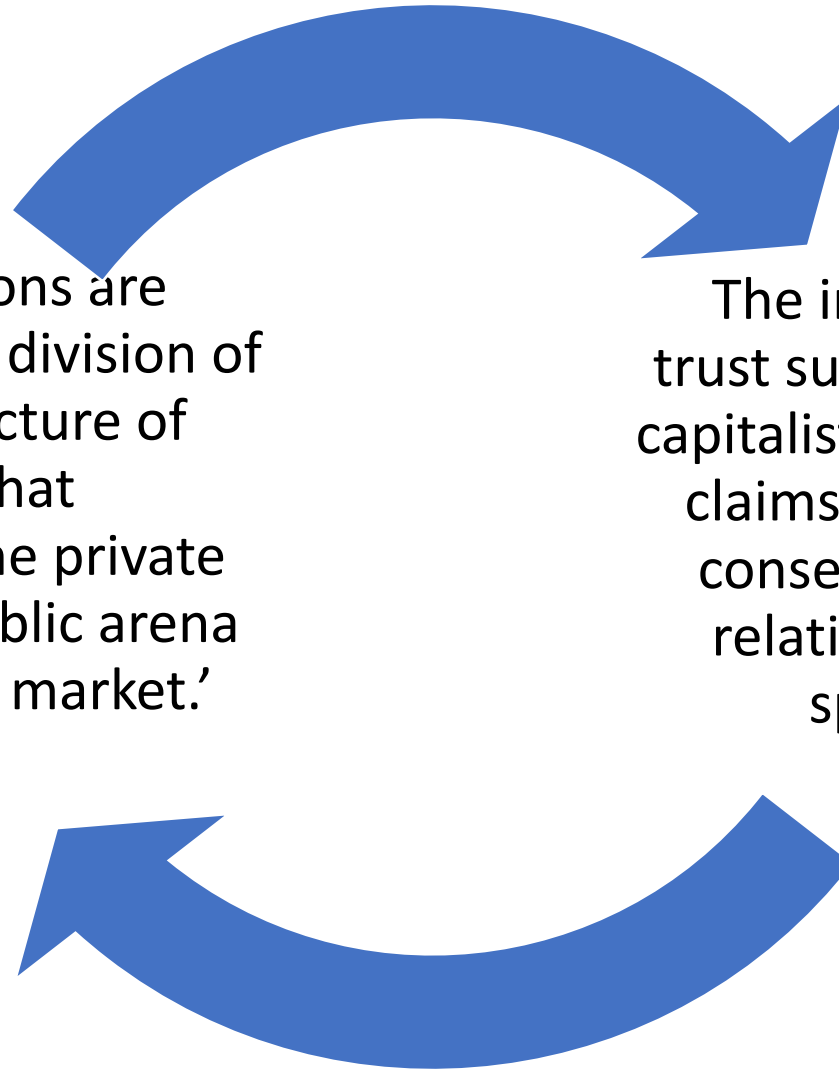
Pettkus v Becker [1980] 2 SCR 834 , 853



‘Conjugal relations are part of a sexual division of labour and structure of subordination that extends from the private home to the public arena of the capitalist market.’

Pateman, 115

The intimate partner trust superimposes the capitalist market and its claims of equality and consent into conjugal relations to establish spousal property distribution



Property law's
individualism is
self-limiting
(for ♀)

- Legal interest prioritized: but is this just?
- Unconscionability: does not extend to the conscience of the marriage relationship as a sexual contract
- Unjust enrichment:
 - ♀ labour not 'enrichment' because it holds no economic value
 - enrichment is not unjust because of male right to ♀ labour and her person



A conclusion

Exchange is concluded at the point of marriage after which the woman's labour — sexual, emotional, physical, and reproductive — is a term of the contract. There is nothing else for women to exchange for property as demanded by the law

So long as wives' labour is remitted pursuant to the sexual contract and not as individuals equal within the intimate union, the problem for women of the norms of individualism and its expression in market terms will remain.



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